Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

In re RICHARD A. COLE, M.D.,

Petitioner.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The petition presents the following questions:

1. Petitioner while incarcerated relied on his sister-in-law to correspond with the courts since he was penniless. Petitioner's appeal of his habeas corpus petition under 28 U.S.C. § 2255 was dismissed for failure to file a brief. Petitioner through his sister-in-law sent in a motion to reinstate the appeal. Despite this the appeal was never reinstated. Petitioner's sister-in-law swore under oath in numerous affidavits that she sent both the original brief and the motion to reinstate via Federal Express and paid for same via Discover Card and that the Clerk was at fault. Petitioner discovered conclusive evidence from Federal Express and Discover Card that his sister-in-law lied and the material was never sent to the appeals court. Thus Petitioner was denied his right to present his case and his sister-in-law had committed fraud on the court. Despite this conclusive evidence, the appeals court denied the motion to reopen the appeal without an opinion. Based on the authority of this Court and customary federal procedure does this refusal to grant relief in the face of undisputed fraud on the court mandate this Court use its supervisory powers and compel the appeals court to docket the appeal brief nunc pro tunc?

2. Petitioner was denied his habeas petition in the district court without an evidentiary hearing, without a request for an answer from the Government, and without an explanation. Was the failure of the district court to allow an evidentiary hearing a violation of the Fifth Amendment?

3. Petitioner was denied appellate review through the malice of his sister-in-law who repeatedly swore

QUESTIONS PRESENTED FOR REVIEW – Continued

under oath that she sent in the appeal brief and later the motion to reinstate the appeal. Were petitioner's rights under the First and Fifth Amendment violated by this act of malice?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	30

APPENDIX TABLE OF CONTENTS

APPENDIX A

Order of the United States District Court for the Western District of Pennsylvania denying habeas corpus petition 1a

APPENDIX B

Order of the United States Court of Appeals for the Third Circuit dismissing appeal of habeas petition for failure to prosecute 3a

APPENDIX C

Order of the United States Court of Appeals for the Third Circuit denying motion to reopen appeal and file appeal brief nunc pro tunc because of fraud on the court or in the alternative to hold hearings on a scheme to commit fraud on the court 4a

TABLE OF CONTENTS – Continued

Page

APPENDIX D

Order of the United States Court of Appeals for the Third Circuit denying rehearing or reconsideration of the motion to reopen the appeal and file appeal brief nunc pro tunc or in the alternative to hold hearings on a scheme to commit fraud on the court 5a

APPENDIX E

28 U.S.C. § 2255..... 6a

APPENDIX F

Miscellaneous Local Appellate Rules for United States Court of Appeals for the Third Circuit.... 8a

APPENDIX G

Affidavit of Sylvia Cole dated July 19, 1999..... 10a

APPENDIX H

Affidavit of Sylvia Cole dated July 19, 1999..... 12a

APPENDIX I

Affidavit of Steven P. Cole dated July 11, 1999... 16a

APPENDIX J

Affidavit of Steven P. Cole dated July 11, 1999... 18a

APPENDIX K

Subpoena for documents to Federal Express 20a

APPENDIX L

Response from Federal Express to subpoena 25a

TABLE OF CONTENTS – Continued

Page

APPENDIX M

Subpoena for documents to Discover Card 26a

APPENDIX N

Response from Discover Card to subpoena 31a

APPENDIX O

Response from Discover Card to subpoena 32a

APPENDIX P

Response from Discover Card to subpoena 33a

APPENDIX Q

49 Pa. Code § 16.96 (deleted as of March 14, 1998) 34a

APPENDIX R

28 Pennsylvania Bulletin 1316, March 14, 1998 ... 38a

TABLE OF AUTHORITIES

Page

Cases

Adams v. United States ex rel. McCann, 317 U.S. 269 (1942) 26, 27

Bill Johnson's Restaurants, Inc. v. National Labor Relations Board, 461 U.S. 731, 103 S.Ct. 2161 (1983) 24

Board of Education v. York, 429 F.2d 66 (CA10 1970), cert den, 401 U.S. 954 (1971) 27

Bodie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780 (1971) 24

Brown v. Allen, 344 U.S. 443 (1953) 20

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S.Ct. 609 (1972) 24

DeLouis et al. v. Meek et al., 2 Iowa 55 13

Evitts v. Lucey, 469 U.S. 387, 83 L.Ed.2d 821, 105 S.Ct. 830 (1985) 22

Field v. United States, 193 F.2d 92 (CA2), cert den, 342 U.S. 894 (1951) 28

Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294 (1972) 16

Harris v. Nelson, 394 U.S. 286, 89 S.Ct. 1082, 22 L.Ed.2d 281 (1969) 20, 21, 25, 26, 28, 29

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 575, 90 L.Ed. 1250, 64 S.Ct. 997 (1944) 10, 11, 12, 13

Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985) 14

Katz v. United States, 389 U.S. 347, 88 S.Ct. 507 (1967) 18

TABLE OF AUTHORITIES – Continued

Page

Kent v. Ricards, 3 Md.Ch. 392 13

Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574 (1986) 15, 17, 18

Martina Theatre Corp. v. Shine Chain Theaters, Inc., 278 F.2d 798 (CA2) (1960) 11

Mississippi Valley Barge Line Co. v. United States, 273 F.Supp 1 (ED Mo. 1967), summarily aff'd, 389 U.S. 579 (1968) 27

Pearce v. Olney, 20 Conn. 544 (1850) 13

Price v. Johnston, 334 U.S. 266 (1948) 20, 26, 28

Rawlings v. Kentucky, 448 U.S. 98, 100 S.Ct. 2556 (1980) 18

Schacht v. United States, 398 U.S. 58, 26 L.Ed.2d 44, 90 S.Ct. 1555 (1970) 22

Smith v. Lowry, 1 Johns. (N.Y.) Ch. 320 13

Sprague v. Ticonic National Bank, 307 U.S. 161, 83 L.Ed. 1184, 59 S.Ct. 777 (1939) 10

Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037 (1976) 15

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) 14

Stutson v. United States, 516 U.S. 193 (1996) 21

Townsend v. Sain, 372 U.S. 293 (1963) 20, 29

United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405 (1984) 19

United States v. McHie, 196 F. 586 (ND Ill.1912) 27

TABLE OF AUTHORITIES – Continued

Page

United States v. New York Telephone, 434 U.S. 159, 98 S.Ct. 364 (1977) 26, 27, 28

United States v. Throckmorton, 98 U.S. (8 Otto) 61, 25 L.Ed. 93 (1878) 10, 12

Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 90 L.Ed. 1447, 66 S.Ct. 1176 (1946) ... 10, 11

Wierich v. DeZoya, 7 Ill. 385 (1845) 13

Wood v. Georgia, 450 U.S. 261, 67 L.Ed.2d 220, 101 S.Ct. 1097 (1981) 22

CONSTITUTION, STATUTES AND RULES

U.S. CONSTITUTION, Article I, Section 9, Clause 2 ..... 1, 21

U.S. CONSTITUTION, Amendment I 2, 8, 24

U.S. CONSTITUTION, Amendment IV .. 2, 3, 15, 16, 23

U.S. CONSTITUTION, Amendment V ..... *passim*

U.S. CONSTITUTION, Amendment VI ... 2, 3, 8, 15, 23

U.S. CONSTITUTION, Amendment XIV, Section 1 ..... 3, 16, 23

18 U.S.C. § 1512 ..... 22, 23

18 U.S.C. § 1621 ..... 22, 25

28 U.S.C. § 455 ..... 15, 18

28 U.S.C. § 528 4

28 U.S.C. § 1254 1

28 U.S.C. § 1651 ..... 1, 26, 27

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 1746 25

28 U.S.C. § 2106 22

28 U.S.C. § 2255 ..... *passim*

42 U.S.C. § 1985 ..... 22, 24

49 Pa. Code § 16.96 ..... 15, 16

Sup. Ct. R. 10(a) and (c) 1

TREATISES

Federal Practice and Procedure, Wright, Miller, Kane (Eds.), 1995, § 2870 10

Moore's Federal Practice, volume 7 § 60.33 (1971 ed.) 9

Moore's Federal Practice, volume 12 § 60.81 (1999 ed.) 9

Wells, Res Adjudicata, section 499 13

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays for a writ of certiorari to review the judgment without opinion of the United States Court of Appeals for the Third Circuit, Docket No. 94-3613, rendered August 1, 2000. In the alternative, petitioner prays for this Court to order the United States Court of Appeals for the Third Circuit to docket Petitioner's appeal brief nunc pro tunc at Docket No. 94-3613.

OPINIONS BELOW

There are no opinions below. The order of the United States Court of Appeals for the Third Circuit denying the motion to reopen the appeal for fraud on the court is reproduced in the Appendix to this petition (A. 3a). The order of dismissal for failure to file an appeal brief entered by the Clerk of the United States Court of Appeals for the Third Circuit is reproduced here at A. 2a. The order of the United States District Court for the Western District of Pennsylvania dismissing the habeas corpus petition under 28 U.S.C. § 2255 without an opinion is reproduced at A. 1a.

STATEMENT OF JURISDICTION

The judgment which this Court is asked to review was rendered without opinion on August 1, 2000 by the United States Court of Appeals for the Third Circuit. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254 and 1651 and Supreme Court Rule 10(a) and (c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, Section 9, Clause 2

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously

ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Constitution, Amendment XIV

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Nature of the case

This is a habeas corpus petition pursuant to 28 U.S.C. § 2255 challenging the constitutional validity of a criminal conviction of Petitioner Richard A. Cole, MD at 91-28 Erie, in the United States District Court for the Western District of Pennsylvania in which Cole's constitutional rights pursuant to the Fourth, Fifth, Sixth, and Fourteenth Amendments were violated.

Facts

A habeas corpus petition was filed to address the egregious conduct of Petitioner's defense counsel especially the failure to plead the perjury, bias and prejudice of the three law enforcement agents who swore to affidavits underlying the search and seizure warrants. Each

of the three agents had overwhelming bias against Petitioner Dr. Richard Cole, and should have been disqualified from the investigation pursuant to 28 U.S.C. § 528. Specifically, Drug Enforcement Administration agent William Dombrowski's ex-wife and daughter were patients of Dr. Cole. Dombrowski testified under oath at a Drug Enforcement Administration hearing in Washington, District of Columbia, in a related matter that he did not approve of his family seeing Dr. Cole and disapproved of Cole's prescription of dextroamphetamine for them. Dombrowski's lover, Janet O'Donnell (aka Janet Ryan), a Pennsylvania State Trooper on assignment with the Drug Enforcement Administration, posed as a patient in Cole's office. Because of O'Donnell's perjury in the above Drug Enforcement Administration hearing, her entire testimony was stricken from the record. She testified there on the same matters sworn to in her affidavits for the search warrants. Federal Bureau of Investigation Agent Thomas Langer knew Cole personally since his son Matthew was referred to Cole for the evaluation of numerous broken bones. Langer became enraged when Cole suggested that the fractures were likely caused by child abuse.

These three agents of the Government sought search and seizure warrants from United States Magistrate Judge Gabriel Bifulco who likewise knew Dr. Cole personally since Bifulco's wife Margaret had been referred to Cole for evaluation of an abnormally high blood calcium level. Cole hospitalized Margaret and performed an extensive diagnostic evaluation. Eventually Cole sent her for major surgery of her neck to remove a parathyroid tumor. Gabriel Bifulco met Cole on many occasions during the course of his wife's diagnosis and therapy. He openly expressed dislike of Cole who was not an "Erie boy" and was particularly dismayed that Cole refused to

have the surgery done locally. Bifulco resented the fact that Cole was the only endocrinologist practicing in Erie, Pennsylvania.

Finally, the Chief Judge of the United States District Court for the Western District of Pennsylvania, the Honorable Maurice B. Cohill, Jr. had Cole's case specifically transferred to him, after it had been assigned to U.S. District Court Judge Glenn Mencer. Cole was told by his former defense counsel, Leonard Ambrose, that Cohill's grandson was prescribed dextroamphetamine for an attention deficit disorder. Ambrose stated that Cohill disliked such therapy and generally disliked doctors who prescribed it. Ambrose's son also had been prescribed dextroamphetamine for similar reasons.

Cole told his new defense counsel, Bailey, Fishman and Leonard, about all of these conflicts of interest, but defense counsel did no investigation, and made no attempt to suppress the search and seizure warrants on this basis.

Upon learning of how badly his defense counsel had represented him, Cole, while incarcerated, filed a habeas corpus petition, specifically a motion to vacate his sentence pursuant to 28 U.S.C. § 2255 which was denied on July 8, 1994 by Judge Cohill.

The denial came without a request for an answer from the Government, without an evidentiary hearing, and without any explanation as to why Cole's allegations of bias, prejudice, perjury and ineffective assistance of counsel were without merit.

Cole filed an appeal in the United States Court of Appeals for the Third Circuit. Because Cole was incarcerated and penniless, he relied upon his family members to help him with making copies and sending pleadings to

the Appeals Court. Specifically, Richard Cole would compose the pleadings and send them to his brother and sister-in-law, Steven Cole and Sylvia Cole, who would then make copies and send them via Federal Express to the Appeals Court (A. 10a-19a).

Thus Richard Cole was shocked when he received notice in early January, 1995, that his appeal had been dismissed for failure to file a brief (A. 3a, 8a). Cole immediately called Sylvia Cole who insisted that the brief had been sent by Federal Express. Sylvia later called the Appeals Court at Richard's behest and reported that a spokeswoman at the Clerk's office stated that the appeal "was accidentally dismissed" and that a motion to reinstate the appeal should be filed. Richard composed same and sent it to Sylvia who allegedly made copies and sent them to the Appeals Court via Federal Express. Sylvia swore under oath that she confirmed delivery with both Federal Express and the Clerk's office (A. 10a-15a). However, Richard never heard any more from the Clerk's office and ultimately, after inquiry, was informed by the Clerk's office that it had never received the brief nor the motion to reinstate the appeal.

Richard was not sure what to do since the Clerk insisted that the material was not received, yet his sister-in-law insisted that she sent it and this was confirmed by both Federal Express and the Clerk's office (A. 10a-15a). Richard filed a second habeas petition that was denied as being a successive petition. Richard attempted to have the Appeals Court docket the petition nunc pro tunc because of clerical error based on the affidavits of Sylvia Cole who swore on repeated occasions that she had sent in the material via Federal Express and paid for it with Discover Card (A. 10a-15a). She produced copies of the

relevant Federal Express airbills. The Appeals Court refused to docket the appeal nunc pro tunc.

Ultimately Richard Cole discovered that by using a federal subpoena, he could obtain records going back to 1994. With subpoenas directed to Federal Express and Discover Card, Richard Cole obtained the billing records for Steven Cole and Sylvia Cole and discovered that the airbill numbers for the alleged packages sent had never been sent by the Coles, nor billed by Discover Card (A. 20a-33a). Furthermore, Federal Express had no record for any delivery to the United States Court of Appeals for the Third Circuit for the time period in question (A. 25a).

Armed with this new information, Richard Cole filed a motion to reopen the appeal for fraud on the court since Richard had been totally prevented from presenting his case to the appeals court by the malice of Steven Cole and Sylvia Cole. This was not a simple matter of negligence in missing one shipment. Sylvia Cole swore that two shipments had been made to the Appeals Court and had been paid for using Discover Card. In fact, neither shipment had been made, nor billed, nor paid.

The Appeals Court refused to grant Richard Cole relief and dismissed the motion to reinstate the appeal without opinion. Cole requested a rehearing which was construed as a motion to reconsider and denied without opinion on August 14, 2000. Thereafter this petition for certiorari was filed.

REASONS FOR GRANTING THE WRIT

Richard Cole has been stripped of his constitutional rights by the events described above. Cole was not represented by effective defense counsel who failed to perform any investigation of the perjury, bias, and prejudice of the law enforcement and judicial officers involved in his case,

a violation of the Sixth Amendment. When Cole attempted to use his right to a habeas corpus petition, he was summarily denied without an evidentiary hearing, without a request for an answer from the Government and without an explanation (by a judge who should have been recused from the original trial had defense counsel been competent), a violation of the Fifth Amendment. Worst of all, when Cole sought to have appellate review of these matters, Cole was blocked from his day in court by the malicious acts of his family members, violations of the First and Fifth Amendments.

The justice system was designed to protect Cole from all of the above. In fact, Cole has had no benefits of any constitutional guarantees and seeks justice from this Court. Specifically Cole's right to habeas corpus has been abrogated as has his right to redress under the Petition Clause of the First Amendment and the Due Process Clause of the Fifth Amendment. Likewise Cole was denied his right to competent counsel pursuant to the Sixth Amendment.

Fraud on the court

Richard Cole was totally blocked from presenting his case to the appeals court through no fault of his own. Cole was imprisoned and penniless and at the mercy of anyone who wanted to take advantage of him. Thus his brother and sister-in-law helped seal Cole's contested conviction by swearing that they were helping Richard Cole while in fact they were plotting to destroy him.

Definition of fraud on the court

Professor Moore at 7 Moore's Federal Practice (1971 ed.) § 60.33 at 60-361 has characterized fraud on the court as,

> "that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases presented for adjudication."

Clearly Richard Cole's case was never impartially and properly adjudicated by the Appeals Court since the appeal brief has never been filed.

Relief is always granted for fraud on the court

The most recent edition of Moore's Federal Practice (1999) at volume 12 § 60.81 elaborates on this concept, and sets the stage for this petition, at page 60-225.

> "Although 'fraud on the court' will always support relief from a judgment (*see* § 60.21[4][a]), regardless of whether it is raised by motion, in an independent action, or sua sponte, it is a separate concept from the idea of an independent action in equity for relief from a judgment. . . . If fraud reaches the level of fraud on the court, relief is *always* merited, and no distinction between 'intrinsic' or 'extrinsic' fraud needs to be made. In the ordinary independent suit, only justice between the parties is at issue, in fraud on the court cases, the integrity of the courts is at issue.
>
> Confusing fraud on the court with the standards for ordinary actions in equity blurs several important distinctions between the two concepts: (1) since it is the integrity of judicial institutions that is paramount in fraud on the

> court claims, there is no real time limit on relief for fraud on the court (*see* § 60.22[4][g]) while a simple independent action in equity is always subject to the doctrine of laches (*see* § 60.83); (2) because the credibility of institutions is protected by the concept of fraud on the court, relief may be had even if the parties who will benefit from relief have 'unclean hands' (*see* § 60.22[4][I]), while a total lack of fault, including clean hands, is a prerequisite or an essential element for relief by way of an independent action in equity (*see* § 60.82[2])."

Cole's appeal was dismissed for failure to file an appeal brief. Not only was this brief not filed, but this failure was part of a scheme to deprive Richard Cole of his right to petition the court, and the Appeals Court of its right to do justice in this matter. The Appeals Court of the Third Circuit has inherent authority to investigate the question of fraud on the court in the procurement of this judgment of dismissal. *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 90 L.Ed. 1447, 66 S.Ct. 1176 (1946). If such fraud cannot be ascertained from the pleadings, the Appeals Court had an obligation to order an adversary proceeding to adjudicate Cole's allegation of fraud on the court. See *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 88 L.Ed. 1250, 64 S.Ct. 997 (1944); *Sprague v. Ticonic National Bank*, 307 U.S. 161, 83 L.Ed. 1184, 59 S.Ct. 777 (1939); and *United States v. Throckmorton*, 98 U.S. (8 Otto) 61, 25 L.Ed. 93 (1878).

Fraud on the court can be investigated sua sponte

Courts do not have to wait for a party to raise a motion. According to Federal Practice and Procedure, 1995, Eds. Wright, Miller, Kane, at § 2870, Fraud on the Court,

> "Almost all of the principles that govern a claim of fraud on the court are derivable from the *Hazel-Atlas* case. The power exists in every court. If the fraud was on an appellate court, that court rather than the trial court, should consider the matter. Although a party may bring the matter to the attention of the court, this is not essential, and the court may proceed on its own motion.13
>
> n. 13. Defrauded district court may take action sua sponte to expunge a judgment constituting fraud on the court and anyone, whether his hands are clean or dirty, may suggest that it do so. *Martina Theatre Corp. v. Shine Chain Theaters, Inc.*, C.A.2d, 1960, 278 F.2d 798."

However, even after Richard Cole brought these matters to the attention of the Appeals Court in a motion to reopen the appeal and docket the appeal brief nunc pro tunc, said motion was dismissed without opinion.

The seminal case for having an appeals court investigate fraud in the procurement of a judgment before it came from the Third Circuit in *Universal, supra,* where this Court stated,

> "A Federal Circuit Court of Appeals has inherent power to investigate whether its affirmance of a judgment was obtained by fraud, and may bring before it by appropriate means all those who may be affected by the outcome." *Ibid.* at 575.

In *Universal,* the Appeals Court investigated the question of fraudulent evidence in a scheme to reach a certain judgment. In the instant case, the fraud comes not from a party, but from someone who schemed to not only damage a party, but to defraud the Appeals Court of the ability and obligation to do justice.

Laches does not apply to fraud on the court

The holdings of this Court with regard to fraud on the court dismiss the concept of laches since any act which has defiled the system comes into the ambit of the reviewing court as a matter of course, regardless of the time involved. As stated by this Court in *Hazel-Atlas, supra,*

> "Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be the preservation of the integrity of the judicial process must always await upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud." *Ibid.* at 246.

The dismissal of Cole's appeal should be vacated

In *Throckmorton, supra,* this Court discussed the long standing tradition of leaving judgments alone, and cited the exception relevant here,

> "But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practised on him by his opponent, as by keeping him away from court, a false promise of compromise; or where the defendant never had knowledge of the suit,

> being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side, – these, and similar cases show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing. See Wells, Res Adjudicata, sect. 499; *Pearce v. Olney*, 20 Conn. 544; *Wierich v. DeZoya*, 7 Ill. 385; *Kent v. Ricards*, 3 Md.Ch. 392; *Smith v. Lowry*, 1 Johns. (N.Y.) Ch. 320; *DeLouis et al. v. Meek et al.*, 2 Iowa, 55.
>
> In all these cases, and many others which have been examined, relief has been granted, on the ground that, by some fraud practised directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court." *Ibid.* at 65.

Sylvia Cole was to have acted on behalf of incarcerated and impoverished Richard Cole, and had promised to do so. In fact she followed her own agenda, and to date has been successful at keeping Richard Cole's appeal from the Appeals Court. Richard Cole has been prevented from presenting his case to the Appeals Court. This Court should not allow her to damage an incarcerated party.

Cole has a meritorious appeal

According to this Court, the determination of whether fraud on the court has been committed does not reach to the merits of the appeal since the judicial process itself has been defiled. *Hazel-Atlas, supra.* Nonetheless, in

the instant case, a real contest of the issues was never developed since defense counsel allowed perjured testimony to procure search and seizure warrants from a biased magistrate. Had Cole been protected from perjured testimony, and protected from illegal search and seizure, he would never have pleaded guilty. Cole did so because his defense counsel insisted it was hopeless for Cole to prevail. In fact, Cole is not guilty of any crimes.

A guilty plea is not valid if provoked by ineffective assistance of counsel

In *Hill v. Lockhart* (1985), 474 U.S. 52, 106 S.Ct. 366 at 367, this Court held:

> "(a) Where a defendant enters a guilty plea upon counsel's advice, the voluntariness of the plea depends on whether the advice was within the range of competence demanded of attorneys in criminal cases. The two-part standard adopted in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, for evaluating claims of ineffective assistance of counsel – requiring that the defendant show that counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different – applies to guilty plea challenges based on the ineffective assistance of counsel. In order to satisfy the second, or "prejudice," requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. . . . "

The failure of Cole's defense counsel to plead the perjury, bias and prejudice of those procuring the search and seizure warrants eviscerated Cole's Fourth Amendment rights and may be addressed by habeas corpus petition citing violation of Cole's Sixth Amendment right to the effective assistance of counsel

This Court in *Kimmelman v. Morrison* (1986), 477 U.S. 365, 106 S.Ct. 2574, held:

> "1. The restriction on federal habeas corpus review of Fourth Amendment claims announced in *Stone v. Powell*, supra, [428 U.S. 465 (1976)] does not extend to Sixth Amendment ineffective-assistance-of-counsel claims which are founded primarily on incompetent representation with respect to a Fourth Amendment issue. Federal courts may grant habeas corpus relief in appropriate cases, regardless of the nature of the underlying attorney error. . . . "

Cole argues that he would never have pleaded guilty if defense counsel had done its job competently, and demanded the statutory disqualification of the Hon. Gabriel Bifulco, who must be removed from this case under authority of 28 U.S.C. § 455(a)(b)(1)(4)(5). Once Bifulco was disqualified, all orders made by him against Cole would be voided, since Cole was not tried in a fair and unbiased tribunal, as is guaranteed by the Constitution. To wit, looking at the search warrant, scant mention is made of the alleged crime of Cole, the violation of 49 Pa. Code § 16.96, because there is no penalty for violating this regulation (A. 34a). Thus, the Hon. Gabriel Bifulco issued a search and seizure warrant against the doctor of his wife, Margaret, alleging that Doctor Cole violated a Pennsylvania Board of Medicine regulation with no penalty. Cole argues that such a warrant was issued by a

biased and prejudiced man. Cole has a basic constitutional right under the Fourth Amendment, that any search warrant issued against him, be issued by a neutral and detached magistrate, not the irate husband of a patient.

The medical regulation that Cole allegedly violated, and was the basis for this Government action against him, 49 Pa. Code § 16.96, was void for vagueness; it expired on January 17, 1992 under its own provisions, and was deleted by the Pennsylvania Board of Medicine on March 14, 1998

In his habeas petition, Cole called attention to the fact that he could not be found in violation of a medical regulation, 49 Pa. Code § 16.96 (A. 34a), which had no penalty since this was itself a violation of Due Process guaranteed by the Fifth and Fourteenth Amendments. *Grayned v. City of Rockford*, 408 U.S. 104 (1972). This alleged violation of a medical regulation with no penalty should not be the basis of an action that charged Cole with criminal penalties and seized all of his assets. Indeed, in Volume 28, Number 11, of the Pennsylvania Bulletin, page 1316, March 14, 1998 (A. 38a), the State Medical Board deleted § 16.96 which Cole allegedly violated. The Board commented that by its own sunset provisions, § 16.96 had been deleted on January 17, 1992, and the March 14, 1998 pronouncement simply confirmed same by amendment. The search and seizure warrant if sought today, could not be granted since a violation of § 16.96 cannot exist. As the Board stated, *Ibid.*, "The Board has determined not to take any action to revise or reestablish this regulation." Cole avers this regulation was constitutionally void for vagueness since it did not cite the penalty for its violation. Cole contends it was

used to promote an illegal action against him. Cole is the only person in Pennsylvania history to be prosecuted under this statute and now it has been wisely deleted.

Since the regulation which Cole allegedly violated is no longer valid, Cole's conviction is no longer valid

The basis of the conviction was Cole's alleged violation of a Pennsylvania medical regulation that had no penalty. This mushroomed into a major drug case resulting in Cole's conviction. Now that the medical regulation has been deleted, Cole's conviction should be likewise vacated.

The failure of Cole's counsel to investigate the constitutional validity of a search and seizure warrant is tantamount to ineffective assistance of counsel

In its holding in the case of *Kimmelman v. Morrison*, *supra*, 477 U.S. at 367, 106 S.Ct. at 2578, this Court discussed the failure to file a timely motion to suppress evidence:

> "(a) While the failure to file a suppression motion does not constitute per se ineffective assistance of counsel, the record clearly reveals that respondent's attorney failed to file a timely suppression motion, not due to trial strategy considerations, but because he was unaware of the search, and of the State's intention to introduce the bedsheet into evidence, due to his failure to conduct any pretrial discovery. Such failure here was not, as required under *Strickland*, reasonable and in accord with prevailing professional norms."

In ordering the search warrant, Bifulco brought Cole's practice to a standstill, since virtually everything

in the office was seized, including patient records, equipment, patient specimens, and financial statements. The search and seizure occurred on May 14 through 17, 1990, and the indictment did not occur until November 1991, giving the Government nearly eighteen months to put together a case based on the evidence seized. A major portion of the case was allegedly demonstrating that Cole's records did not show that the medication, dextroamphetamine, was appropriately given for idiopathic edema, but rather for obesity. Without the evidence seized, this would have been impossible. Furthermore, the Government seized patient samples and lab records, and alleged that tests were not done, yet billed for, and thus constituted mail fraud. Without the search, there would be no evidence to support this. Finally, the search yielded income statements from Cole's practice, which allegedly showed different amounts than those reported on Cole's tax returns, supporting a charge of tax evasion. Again, without the search, such evidence would not have been available.

This Court, in *Kimmelman v. Morrison, supra*, 477 U.S. at 374, 106 S.Ct. at 2582, stated:

> "The gravamen of a Fourth Amendment claim is that the complainant's legitimate expectation of privacy has been violated by an illegal search or seizure. See, e.g., *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). In order to prevail, the complainant need prove only that the search was illegal and that it violated his reasonable expectation of privacy in the item or place at issue. See, e.g. *Rawlings v. Kentucky*, 448 U.S. 98, 104, 100 S.Ct. 2556, 2561, 65 L.Ed.2d 633 (1980)."

Cole had a reasonable expectation that Bifulco would follow the authority of 28 U.S.C. § 455(a)(b)(1)(4)(5) and

disqualify himself from any proceedings against Cole and not be the issuer of a search warrant against the doctor of his wife. Cole had a right to expect that a medical regulation with no penalty would not be used as an excuse to search and seize his property. Cole had a right to expect that law enforcement would not lie to get a search warrant.

The search and seizure warrants should have been suppressed

The remedy for a biased and prejudiced magistrate has been stated by the United States Supreme Court in *U.S. v. Leon* (1984), 468 U.S. 897 at 898, 104 S.Ct. 3405 at 3408 where it held:

> "Suppression remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth, or if the issuing magistrate wholly abandoned his detached and neutral judicial role."

Cole argues that all the evidence gathered from the search warrant issued by Bifulco should have been suppressed, leaving little or no case for the Government. Cole would not have pleaded guilty in this setting, and would have insisted on a trial.

This is a habeas petition which should be accorded deference

The basis of this action is that Petitioner Cole's constitutional rights in his criminal conviction were violated thus rendering the trial a farce in that there was no true adversarial confrontation. Defense counsel either rolled over for the Government or fell asleep on Cole's rights. The very purpose of the habeas petition is to allow a

collateral attack. A direct appeal was never prosecuted in this action to challenge the conviction since defense counsel insisted there were no matters for appeal. Thus Cole was left only with potential habeas relief.

Cole was entitled to an evidentiary hearing as part of due process under the Fifth Amendment

By the law of 28 U.S.C. § 2255, Cole is guaranteed an evidentiary hearing upon appropriate showing (A. 6a). He never got one despite the fact that none of his allegations had been developed in the record of the case. As stated in *Harris v. Nelson, supra,* at 291,

> "It is now established beyond the reach of reasonable dispute that the federal courts not only may grant evidentiary hearings to applicants, but must do so upon an appropriate showing. *Townsend v. Sain,* 372 U.S. 293, 313 (1963); *Brown v. Allen,* 344 U.S. 443, 464, n.19 (1953). And this Court has emphasized, taking into account the office of the writ and the fact that the petitioner, being in custody, is usually handicapped in developing the evidence needed to support in necessary detail the facts alleged in his petition, that a habeas corpus proceeding must not be allowed to founder in a 'procedural morass.' *Price v. Johnston,* 334 U.S. 266, 269 (1948)."

Cole's allegations of perjury, bias and prejudice have never been addressed by any court.

The writ of habeas corpus is to be administered with initiative and flexibility

This Court has repeatedly stated that the writ of habeas corpus must be administered with initiative and flexibility to insure that miscarriages of justice within its reach are surfaced and corrected.

> "The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action. Its pre-eminent role is recognized by the admonition in the Constitution that: 'The Privilege of the Writ of Habeas Corpus shall not be suspended * * * .' U.S. Const., Art. I, s9, cl.2. The scope and flexibility of the writ – its capacity to reach all manner of illegal detention – its ability to cut through barriers of form and procedural mazes – have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286 at 291, 89 S.Ct. 1082 at 1086, 22 L.Ed.2d 281 (1969).

There can be no doubt that Sylvia and Steven Cole effectively denied Richard Cole access to the Appeals Court. Dismissing Richard's appeal because of their malice was a gross miscarriage of justice that should be remedied.

Richard Cole was prejudiced by attempting to correspond with the courts while incarcerated

This Court has been solicitous of such predicaments and has recognized that filing limits should be made flexible for those in similar circumstances.

In *Stutson v. United States*, 516 U.S. 193 (1996) at 196, this Court stated,

> "Finally, it is not insignificant that this is a criminal case. When a litigant is subject to the continuing coercive power of the Government in the form of imprisonment, our legal traditions reflect a certain solicitude for his rights, to

> which the important public interests in judicial efficiency and finality must occasionally be accommodated. We have previously refused to allow technicalities that caused no prejudice to the prosecution to preclude a remand under 28 U.S.C. § 2106 (1988 ed.) 'in the interests of justice.' *Wood v. Georgia*, 450 U.S. 261, 265, n.5. 67 L.Ed 2d 220, 101 S.Ct. 1097 (1981). And procedural accommodations to prisoners are a familiar aspect of our jurisprudence. See, e.g. 28 U.S.C. § 2255 (1988 ed.) (habeas review in spite of an adverse final appellate decision); *Evitts v. Lucey*, 469 U.S. 387, 83 L.Ed.2d 821, 105 S.Ct. 830 (1985) (relief for ineffective assistance of retained counsel on appeal); *Schacht v. United States*, 398 U.S. 58, 63-64, 26 L.Ed.2d 44, 90 S.Ct. 1555 (1970) (unlike in civil cases, time limits for petitions for certiorari in criminal cases are not jurisdictional)."

Richard Cole has a legal right to have his appeal pursuant to 28 U.S.C. § 2255. Cole is petitioning this Court to protect his rights and give him the appeal to which he is entitled by the law of 28 U.S.C. § 2255 (A. 6a) which states,

> "An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus."

Richard Cole was illegally blocked from the Appeals Court by Sylvia Cole, in collusion with Steven Cole, a prima facie violation of 42 U.S.C. § 1985, 18 U.S.C. § 1512, and 18 U.S.C. § 1621.

The gross miscarriage of justice

This case involves a conviction made possible by defense counsel who insisted to Petitioner Cole that he

plead guilty since there was no viable defense. In reality, there was no viable defense because defense counsel failed to perform competently. This was not an adversarial trial but rather, a capitulation to the Government engineered by incompetent defense counsel. In his habeas corpus petition, Cole raised five major issues of constitutional dimension: 1. ineffective assistance of counsel, 2. bias and prejudice of the magistrate who issued the search and seizure warrants as well as the three officers who swore to the affidavits underlying the warrants, 3. documented perjury of one of the officers swearing to the above warrant who lied about her activity with Cole in a related Drug Enforcement Administration hearing, 4. bias and prejudice of the trial court judge, and 5. vagueness of a medical regulation with no penalty which was transformed without notice into a criminal statute. None of these issues have ever been heard by any court, nor has any evidentiary hearing ever been held on these matters despite the fact that they had not been fully developed in the record of this case. Thus Cole's rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments have been violated.

On top of these problems there are the obstruction of justice, civil rights violations, and perjury which have gone unnoticed and unpunished.

Obstruction of justice

Title 18, Chapter 73, Obstruction of Justice § 1512, Tampering with a witness, victim, or an informant, states in relevant part,

> " . . .
>
> (b) Whoever knowingly uses intimidation . . . or engages in misleading conduct toward another person, with intent to –

(1) influence, delay or prevent the testimony of any person in an official proceeding;
(2) cause or induce any person to –
(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding; . . .
shall be fined under this title or imprisoned not more than ten years, or both."

Clearly Sylvia Cole and Steven Cole have succeeded in keeping Richard Cole's appeal brief from the Appeals Court and in so doing have changed the course of justice in this case.

Civil rights violations: denial of Cole's right to access the courts under the First and Fifth Amendments

There is no doubt that access to the courts of the United States is guaranteed by the Petition Clause of the First Amendment. *Bill Johnson's Restaurants, Inc. v. National Labor Relations Board*, 461 U.S. 731, 103 S.Ct. 2161 (1983); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609 (1972).

The right to Due Process of law pursuant to the Fifth Amendment is fundamental to the American constitutional system. *Bodie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780 (1971). Cole was never given a meaningful opportunity to be heard in his appeal.

Willful blockage of access to the courts of the United States by two or more persons constitutes a violation of 42 U.S.C. § 1985, which states in relevant part,

" . . . if two or more persons conspire for the purpose of impeding, hindering, obstructing, or

> defeating, in any manner, the due course of justice in any State or Territory, with intent to deny any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws; . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators."

Cole could well sue his brother and sister-in-law for these acts but that will not get his appeal docketed.

Perjury

Sylvia Cole is guilty of perjury as defined by Title 18, Chapter 79, Perjury § 1621, Perjury generally, where it states,

> "Whoever –
>
> . . .
>
> (2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true; is guilty of perjury, . . . "

All of her sworn statements (A. 10a-15a) have been disproven by clear and convincing evidence.

A special duty exists with regard to habeas corpus petitions

The Appeals Court has a special duty in adjudicating Cole's habeas corpus petitions as stated by this Court in *Harris v. Nelson*, 394 U.S. 286 at 299,

> "Clearly, in these circumstances, the habeas corpus jurisdiction and the duty to exercise it

> being present, the courts may fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage. Where their duties require it, this is the inescapable obligation of the courts. Their authority is expressly confirmed in the All Writs Act, 28 U.S.C. § 1651."

Thus this Court mandates that federal courts, including appeals courts, fashion appropriate remedies to do justice.

Most importantly, this Court in *United States v. New York Telephone Co.*, 434 U.S. 159 at 172 stated,

> "The All Writs Act provides: 'The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.' 28 U.S.C. § 1651(a) . . .
>
> This Court has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it had previously issued in its exercise of jurisdiction otherwise obtained: 'This statute has served since its inclusion, in substance, in the original Judiciary Act as a "legislatively approved source of procedural instruments designed to achieve 'the rational ends of law.' " ' *Harris v. Nelson*, 394 U.S. 286, 299 (1969), quoting *Price v. Johnston*, 334 U.S. 266, 282 (1948). Indeed, '[u]nless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it.' *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942)."

In the original appeal of Cole's denied 2255 motion, Cole was ordered to file his brief on time or face dismissal. The dismissal occurred because Sylvia and Steven Cole effectively frustrated Richard Cole's attempt to follow the orders of the Appeals Court. The malice of Sylvia and Steven Cole defrauded the Appeals Court of the opportunity to do justice in this case. This Court went on in *New York Telephone, supra*, p. 173,

> "The Court has consistently applied the Act flexibly in conformity with these principles. Although § 262 of the Judicial Code, the predecessor to § 1651, did not expressly authorize courts, as does § 1651 to issue writs 'appropriate' to the proper exercise of their jurisdiction but only 'necessary' writs, *Adams* held that these supplemental powers are not limited to those situations where it is 'necessary' to issue the writ or order 'in the sense that the court could not otherwise physically discharge its appellate duties.' 317 U.S., at 273."

This Court's holding demands that the Third Circuit exercise its jurisdiction and powers to protect Richard Cole. In *New York Telephone, supra*, p. 174 this Court continued,

> "The power conferred by the Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, *Mississippi Valley Barge Line Co. v. United States*, 273 F.Supp. 1, 6 (ED Mo. 1967) summarily aff'd, 389 U.S. 579 (1968); *Board of Education v. York*, 429 F.2d 66 (CA10 1970), cert. denied, 401 U.S. 954 (1971), and encompasses even those who have not taken any affirmative action to hinder justice. *United States v. McHie*, 196 F. 586 (ND Ill.1912);

> *Field v. United States*, 193 F.2d 92, 95096 (CA2), cert.denied, 342 U.S. 894 (1951)."

Cole agrees that the Clerk of the Appeals Court is without fault here. However, the Clerk as part of his ministerial duties dismissed Cole's appeal since he did not receive Cole's brief. The failure to file the brief was not Cole's fault and should be corrected. Otherwise, Sylvia's treachery has irrevocably damaged Cole from which he has no source of relief. This Court in *New York Telephone, supra*, at 374 stated,

> "The dissent's attempt to draw a distinction between orders in aid of a court's own duties and jurisdiction and orders designed to better enable a party to effectuate his rights and duties, post, at 189-190 is specious. Courts normally exercise their jurisdiction only in order to protect the legal rights of parties. In *Price v. Johnston*, 334 U.S. 266 (1948), for example, the production of a federal prisoner in court was required in order to enable him to effectively present his appeal which the court had jurisdiction to hear. Similarly, in *Harris v. Nelson*, 394 U.S. 286 (1969), discovery was ordered in connection with a habeas corpus proceeding for the purpose of enabling a prisoner adequately to protect his rights."

Cole is petitioning this Court to protect his rights and give him the appeal to which he is entitled by the law of 28 U.S.C. § 2255.

A remedy should be fashioned to do justice

This Court mandates that federal courts, including appeals courts, fashion appropriate remedies to do justice. It is within the enumerated powers of the Appeals Court and this Court to docket the appeal brief in this

matter nunc pro tunc. As stated in *Harris v. Nelson, supra,* at 292,

> "There is no higher duty of a court, under our Constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law. This Court has insistently said that the power of the federal courts to conduct inquiry in habeas corpus is equal to the responsibility which the writ involves: 'The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary.' *Townsend v. Sain, supra,* at 312."

The necessity of an appeal is even more pressing in this matter since the District Court summarily dismissed the motion under 28 U.S.C. § 2255 without explanation, without an evidentiary hearing, and without an answer from the Government. Cole's defense counsel insisted that there were no matters for appeal, and therefore, raised none except the amount of the fine and/or restitution. It would be a most unusual case if defense counsel in the record laid out a cause for ineffective assistance of counsel so that a reviewing court could sua sponte declare ineffective assistance of counsel and vacate the judgment. Neither the District Court, nor the Appeals Court have ever addressed the issues raised in the § 2255 motion, especially the allegations of ineffective assistance of counsel who failed to provide Cole with a competent defense.

Cole has a meritorious appeal which needs to be heard. According to the authority of this Court, Cole deserves relief from fraud on the court. Even if this Court

does not accept Cole's allegations, it owes Cole and the integrity of the Courts of the United States the duty to investigate fraud on the court. Therefore, Cole should be granted certiorari in this matter, or in the alternative, this Court could simply order that Cole's appeal brief in his habeas corpus petition be filed in the United States Court of Appeals for the Third Circuit nunc pro tunc.

CONCLUSION

Cole respectfully requests this Court to grant certiorari in this matter, or in the alternative, to simply order the United States Court of Appeals for the Third Circuit to docket Cole's appeal brief nunc pro tunc at Docket No. 94-3613. Further, that Appeals Court should investigate Cole's allegations of fraud on the court so that justice may be done.

I declare under the penalty of perjury that the foregoing is true and correct.

Respectfully submitted,

Dated October 20, 2000

RICHARD A. COLE, M.D.
Pro Se Petitioner
14 Charles Street
Newburyport, MA 01950
Tel.978.462.8470

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RICHARD A. COLE, M.D.	)	
Plaintiff,	)	CIVIL ACTION NO. 94-164E
v.	)	CRIMINAL NO. 91-28E
UNITED STATES OF AMERICA,	)	
Defendant	)	

ORDER

AND NOW, to-wit, this 8th day of July, 1994, it is hereby ORDERED, ADJUDGED and DECREED that:

1. Motion to Amend habeas Corpus Petition (Doc. 141) be and the same hereby is DENIED;

2. Motion to Vacate (Doc. 138) be and the same hereby is DENIED;

3. Motion for Recusal of Judge Cohill under 28 U.S.C. sections 144 and 455 (Doc. 141) be and the same hereby is DENIED;

4. Motion for Recusal of Judge Cohill from All Proceedings (Doc. 141) be and the same hereby is DENIED.

5. Motion to Vacate All Judgments, Orders and Decrees Against Plaintiffs (Doc. 141) be and the same hereby is DENIED.

/s/ Maurice B. Cohill, Jr.
MAURICE B. COHILL, JR.
JUDGE

cc: Richard A. Cole, M.D.
Reg. No. 10509-068
BHM-H FPC Maxwell AFB
Montgomery, AL 36112

Asst. United States Attorney

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-3613

USA

vs.

Cole

Richard A. Cole, Appellant

(Western District of Pennsylvania Civil No. 91-cr-00028E)

ORDER

Pursuant to Rule 3(a) of the Federal Rules of Appellate Procedure and Third Circuit LAR Misc. 107.2,

It is ORDERED that the above-entitled case is hereby dismissed for failure to timely prosecute;

It is FURTHER ORDERED that a certified copy of this order be issued forthwith as the mandate.

For the Court,
/s/ [Illegible]
Acting Clerk

Date: December 30, 1994

cc: Mr. Richard A. Cole
Bonnie R. Schlueter, Esq.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

June 23, 2000
#A-84

No. 94-3613

Richard A. Cole,
Appellant

v.

United States
(WD of PA D.C. Crim No. 91-28E)

Present: MCKEE, BARRY and FUENTES, *Circuit Judges*

(Corrected Version of) Motion by Appellant to Reopen this Appeal, to Docket Petitioner's Habeas Corpus Appeal Brief Nunc Pro Tunc Because of Fraud on the Court, or in the Alternative, to Order Hearings on the Matter of a Scheme to Commit Fraud on this Court by Sylvia Cole and Steven Cole which this Court may wish to construe as a Motion to Reopen Appeal and for Leave to File Brief Out of Time.

/s/ Lynn M. Caswell
Lynn M. Caswell
Case Manager (267)299-4922

Response was due 6/21/00

ORDER

The foregoing motion is denied.

By the Court

/s/ Maryanne Trump Barry
Maryanne Trump Barry
Circuit Judge

Dated: August 1, 2000

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

August 16, 2000
#E-8

No. 94-3613

United States
v.
Richard A. Cole,
Appellant
(WD of PA D.C. Crim No. 91-28E)

Present: MCKEE, BARRY and FUENTES, *Circuit Judges*

Petition for Rehearing En Banc by Appellant, Richard A. Cole, which the Court may wish to **construe as** a Motion to Reconsider Court Order of August 1, 2000 denying Motion to Reopen Appeal. This will not be filed as a Petition for Rehearing or distributed to the Court en banc unless so directed.

/s/ Lynn M. Caswell
Lynn M. Caswell
Case Manager (267)299-4922

#A-84 order of 8/1/00
attached for your information

ORDER

The foregoing motion is denied.

By the Court

/s/ Maryanne Trump Barry
Maryanne Trump Barry
Circuit Judge

Dated: August 24, 2000

APPENDIX E

Title 28. Section 2255. Federal custody; remedies on motion attacking sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

APPENDIX F

MISCELLANEOUS LOCAL APPELLATE RULES FOR UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

LAR MISC. 107.0 SANCTIONS

107.2 Dismissal for Failure to Prosecute.

(a) When an appellant fails to comply with the Federal Rules of Appellate Procedure or the Local Appellate Rules of this Court, the Clerk shall issue written notice to counsel or to the appellant who appears pro se that upon the expiration of fourteen (14) days from the date of the notice, the appeal may be dismissed for want of prosecution unless appellant remedies the deficiency within that time. If the deficiency is not remedied within this period, the Clerk is authorized to dismiss the appeal for want of prosecution and issue a certified copy thereof to the Clerk of the district court as the mandate. The appellant shall not be entitled to remedy the deficiency after the appeal is dismissed except by the order of the Court. A motion to set aside such an order must be justified by the showing of good cause and may not be filed after ten (10) days of the date of dismissal. If the appeal is one taken from the District Court of the Virgin Islands, an additional ten (10) days shall be added to the time limits specified in this paragraph.

(b) Notwithstanding subsection (a), if an appellant fails to comply with the Federal Rules of Appellate Procedure and the Local Appellate Rules with respect to the timely filing of a brief and appendix, at any time after the seventh day following the due date, the Clerk is authorized

to dismiss the appeal for want of timely prosecution. The procedure to be followed in requesting an order to set aside dismissal of the appeal is the same as that set forth in subsection (a).

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RICHARD A. COLE, M.D., Appellant/Petitioner vs. UNITED STATES OF AMERICA, Appellee/Respondent	))))))	**MANDAMUS ACTION** **Civil Action No. 98-3612** Based on Docket No. 94-3613 from Crim. No. 91-28 Erie **AFFIDAVIT OF SYLVIA COLE**

I, Sylvia Cole, solemnly swear that I am a resident of the Commonwealth of Massachusetts, over the age of eighteen years, have personal knowledge of the facts stated herein, and can testify competently under oath in court to their truth if necessary. I swear under oath that the following facts are true:

1 . . . I signed the attached affidavit in this case before a notary public on or about July 19, 1999 after a copy had been given to me for my review and for my records prior to signing.

I swear under oath and under the penalties of perjury that the foregoing is true and correct.

Dated July 19, 1999

/s/ Sylvia Cole
Sylvia Cole

Commonwealth of Massachusetts
County of Essex

July 19, 1999
SS.

Then personally appeared Sylvia Cole, the above named affiant, who known to me, signed or acknowledged the foregoing affidavit as her free act and deed, before me.

/s/ John J. Quinn, Jr.
John J. Quinn, Jr.
Notary Public

My Commission Expires
July 5, 2002

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RICHARD A. COLE, M.D., Appellant/Petitioner vs. UNITED STATES OF AMERICA, Appellee/Respondent	))))))	**MANDAMUS ACTION** **Civil Action No. 98-3612** Based on Docket No. 94-3613 from Crim. No. 91-28 Erie **AFFIDAVIT OF SYLVIA COLE**

I, Sylvia Cole, solemnly swear that I am a resident of the Commonwealth of Massachusetts residing at 8 Hallisey Drive, Newburyport, Massachusetts 01950, over the age of eighteen years, have personal knowledge of the facts stated herein, and can testify competently under oath in court to their truth if necessary. I swear under oath that the following facts are true:

1 . . . I served as the mailing agent for my brother-in-law, Richard A. Cole, M.D., during the period of April 20, 1993, to October 5, 1995, while Doctor Cole was incarcerated at Federal Prison Camp, Maxwell Air Force Base, Montgomery, AL. I did so because, while incarcerated, Doctor Cole did not have the necessary funds to make copies, or afford postage to be able to communicate with the Courts of the United States.

2 . . . Thus Doctor Cole would send me material from Maxwell addressed to Mr. & Mrs. Steven P. Cole, 8 Hallisey Drive, Newburyport, MA 01950 to be copied with instructions as to where and how to send it. Steven P.

Cole is my husband and the brother of Richard A. Cole, MD.

3 . . . On or about November 22, 1994, I received a packet of material from Doctor Cole containing, but not limited to, an appellant's brief for his appeal in the United States Court of Appeals for the Third Circuit, Docket No. 94-3613, a motion for an expedited appeal, and a motion for release to his own recognizance. I sent all this material plus my declaration: proof of service by mail to the Clerk of Court, United States Court of Appeals for the Third Circuit, Philadelphia, PA on Wednesday, November 23, 1994, via Federal Express for arrival on Friday, November 25, 1994, since Thursday was Thanksgiving Day. I called Federal Express on Friday, and they assured me that the package was delivered. I have attached a copy of the Federal Express receipt with tracking number of 2318346074. This was billed to my Federal Express Account No. 173808992 which in turn was billed to my Discover Card No. 6011 0013 3151 6320 expiration 04/99.

4 . . . In early January 1995, Doctor Cole called me to tell me that his appeal, Docket No. 94-3613, had been dismissed on December 30, 1994, because of "failure to timely prosecute", and that none of the material I sent had been received. I called the Clerk's Office, and the spokeswoman said that it may have been "the one that was dismissed by accident". I was told that Doctor Cole could simply file a motion to have the dismissal set aside for good cause. This call was made from my home telephone (508)462-8805 now (978)462-8805. I thereupon copied all the material sent earlier. Doctor Cole sent me the motion to set aside this dismissal, and I sent this along

with the appellant's brief, motion for an expedited appeal, and my declaration: proof of service by mail to the Clerk of Court, U.S. Court of Appeals for the Third Circuit in Philadelphia, PA, via Federal Express on Friday, January 6, 1995, for delivery on Monday, January 9, 1995. Attached is the Federal Express Receipt with tracking number 2318346332 which was likewise billed to my account listed above and then billed to my Discover Card account.

5 . . . I called the Clerk's Office on Monday, January 9, 1995, to see if the material had been delivered, and was assured by the spokeswoman that all was in order. Despite the fact that I sent a request for a date stamped copy of the cover sheet of each of the documents when I sent the material, I never received any date stamped copies. I have attached the Federal Express receipt and tracking number.

I swear under oath and under the penalties of perjury that the foregoing is true and correct.

Dated July 19, 1999

/s/ Sylvia Cole
Sylvia Cole

Commonwealth of Massachusetts
County of Essex

July 19, 1999
SS.

Then personally appeared Sylvia Cole, the above named affiant, who known to me, signed or acknowledged the foregoing affidavit as her free act and deed, before me.

/s/ John J. Quinn, Jr.
John J. Quinn, Jr.
Notary Public
My Commission Expires
July 5, 2002

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RICHARD A. COLE, M.D., Appellant/Petitioner vs. UNITED STATES OF AMERICA, Appellee/Respondent	))))))	**MANDAMUS ACTION** **Civil Action No. 98-3612** Based on Docket No. 94-3613 from Crim. No. 91-28 Erie **AFFIDAVIT OF STEVEN P. COLE**

I, Steven P. Cole, solemnly swear that I am a resident of the Commonwealth of Massachusetts, over the age of eighteen years, have personal knowledge of the facts stated herein, and can testify competently under oath in court to their truth if necessary. I swear under oath that the following facts are true:

1 . . . I signed the attached affidavit in this case before a notary public on or about July 28, 1999 after a copy had been given to me for my review and for my records prior to signing.

I swear under oath and under the penalties of perjury that the foregoing is true and correct.

Dated July 11, 1999

/s/ Steven P. Cole
Steven P. Cole

Commonwealth of Massachusetts
County of Essex

July 11, 1999
SS.

Then personally appeared Steven P. Cole, the above named affiant, who known to me, signed or acknowledged the foregoing affidavit as his free act and deed, before me.

/s/ John J. Quinn, Jr.
John J. Quinn, Jr.
Notary Public
My Commission Expires
July 5, 2002

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RICHARD A. COLE, M.D., Appellant/Petitioner vs. UNITED STATES OF AMERICA, Appellee/Respondent	))))))	**MANDAMUS ACTION** **Civil Action No. 98-3612** Based on Docket No. 94-3613 from Crim. No. 91-28 Erie **AFFIDAVIT OF STEVEN P. COLE**

I, Steven P. Cole, solemnly swear that I am a resident of the Commonwealth of Massachusetts residing at 8 Hallisey Drive, Newburyport, Massachusetts 01950, over the age of eighteen years, have personal knowledge of the facts stated herein, and can testify competently under oath in court to their truth if necessary. I swear under oath that the following facts are true:

1 . . . I served as the mailing agent for my brother, Richard A. Cole, M.D., during the period of April 20, 1993, to October 5, 1995, while Doctor Cole was incarcerated at Federal Prison Camp, Maxwell Air Force Base, Montgomery, AL. I did so because, while incarcerated, Doctor Cole did not have the necessary funds to make copies, or afford postage to be able to communicate with the Courts of the United States.

2 . . . Thus Doctor Cole would send me material from Maxwell addressed to Mr. & Mrs. Steven P. Cole, 8 Hallisey Drive, Newburyport, MA 01950 to be copied with instructions as to where, and how to send it.

3 . . . I sent many packages via Federal Express on behalf of Richard A. Cole, MD. Each of these was billed to the Federal Express account of Steven P. Cole, 8 Hallisey Drive, Newburyport, MA 01950, account no. 173808992 which in turn was billed to the Discover Card of Steven P. Cole, account no. 6011 0013 3151 6320 expiration 04/99. I personally reviewed the Discover Account monthly statements to make sure each Federal Express package sent for delivery had been billed and thereafter was paid through this Discover Card account. All Federal Express packages sent for Richard A. Cole, MD were billed as above; there were no exceptions.

I swear under oath and under the penalties of perjury that the foregoing is true and correct.

Dated July 11, 1999

/s/ Steven P. Cole
Steven P. Cole

Commonwealth of Massachusetts
County of Essex

July 11, 1999
SS.

Then personally appeared Steven P. Cole, the above named affiant, who known to me, signed or acknowledged the foregoing affidavit as his free act and deed, before me.

/s/ John J. Quinn, Jr.
John J. Quinn, Jr.
Notary Public
My Commission Expires
July 5, 2002

APPENDIX K

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Richard A. Cole, MD, Plaintiff, vs. Pennsylvania Blue Shield, Hammermill Paper Co., Lakeview Forge, Warren State Hospital, and employee benefit programs to be identified and named later, Defendants	)))))))))))	C.A. No. 98-92 Erie

SUBPOENA TO PRODUCE DOCUMENTS OR THINGS FOR DISCOVERY PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 45

To: Lance McGlothin, Records Custodian
Federal Express Legal Dept.
1980 Nonconnah Blvd.
Memphis, TN 38132

Within twenty (20) days after the service of this subpoena, you are ordered by the court to produce the following documents or things: **proof of service of the following two packages allegedly billed to account no. 173808992, Steven P. Cole, 8 Hallisey Drive, Newburyport, MA 01950, airbill no. 2318346074 sent on or about November 23, 1994 to U.S. Court of Appeals, Philadephia, PA and airbill no. 2318346332 billed to the same account and sent to the same place on or about January 6, 1995. Copies of these two airbills are attached. Kindly confirm that you will research both the**

airbill number and dates of shipment from November 15, 1994 through January 15, 1995. Please provide a copy of the "Customer Detail Screen" for this account.

Please send to Richard A. Cole, 14 Charles Street, Newburyport, MA 01950 within twenty (20) days of service of this subpoena.

You may deliver or mail legible copies of the documents or produce things requested by this subpoena, together with the certificate of compliance, to the party making this request at the address listed above. You have the right to seek in advance the reasonable cost of preparing the copies or producing the things sought.

If you fail to produce the documents or things required by this subpoena within twenty (20) days after its service, the party serving this subpoena may seek a court order compelling you to comply with it.

This subpoena was issued at the request of the following person: Richard A. Cole, 14 Charles Street, Newburyport, MA 01950, Tel.978.462.8470, Plaintiff pro se.

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for a deposition, hearing or trial.

(B) Subject to paragraph d(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to

a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to an undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a

substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

By the Court:

/s/ James A. Drash
James A. Drash

Clerk, Civil Divison

Date: July 16, 1999

Seal of the Court

APPENDIX L

Federal Express Corporation
1980 Nonconnah Boulevard
Memphis, TN 38132

U.S. Mail: PO Box 727
Memphis, TN 38194-1842

Telephone 901-395-3382

FedEx
Federal Express

VIA OVERNIGHT LETTER

July 28, 1999

Mr. Richard Cole
14 Charles Street
Newburyport, MA 01950

RE: Subpoena Response – #98 92 Erie – FEC File # 16892

Dear Mr. Cole:

Our research department found no documents of deliveries to the address listed on the above referenced subpoena during the time period of 11/15/94 thru 01/15/95.

Sincerely,

FEDERAL EXPRESS CORPORATION

/s/ Lance McGlothin
Lance McGlothin
Records Custodian

901-395-3320

Fax # 901-395-5861

APPENDIX M

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Richard A. Cole, MD,	)	
Plaintiff,	)	C.A. No. 98-92 Erie
vs.	)	
Pennsylvania Blue	)	
Shield, Hammermill	)	
Paper Co., Lakeview	)	
Forge, Warren State	)	
Hospital, and employee	)	
benefit programs to be	)	
identified and named	)	
later,	)	
Defendants	)	

SUBPOENA TO PRODUCE DOCUMENTS OR THINGS FOR DISCOVERY PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 45

To: Discover Financial Services, Inc.
Attn: Kevin Mason
2500 Lake Cook Road, One North
Riverwoods, IL 60015

Within twenty (20) days after the service of this subpoena, you are ordered by the court to produce the following documents or things: **copies of any charges made to the following account number 6011 0013 3151 6320 expiration 04-99 held by Steven P. Cole in the time period of June 1994 through October 1995 by Federal Express and the dates of those charges. Steven P. Cole's address is 8 Hallisey Drive, Newburyport, MA 01950, soc.sec.#023-38-3566, DOB 05-22-58.**

Please send to Richard A. Cole, 14 Charles Street, Newburyport, MA 01950 within twenty (20) days of service of this subpoena.

You may deliver or mail legible copies of the documents or produce things requested by this subpoena, together with the certificate of compliance, to the party making this request at the address listed above. You have the right to seek in advance the reasonable cost of preparing the copies or producing the things sought.

If you fail to produce the documents or things required by this subpoena within twenty (20) days after its service, the party serving this subpoena may seek a court order compelling you to comply with it.

This subpoena was issued at the request of the following person: Richard A. Cole, 14 Charles Street, Newburyport, MA 01950, Tel.978.462.8470, Plaintiff pro se.

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of

premises need not appear in person at the place of production or inspection unless commanded to appear for a deposition, hearing or trial.

(B) Subject to paragraph d(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in

person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to an undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot

be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

By the Court:

/s/ James A. Drash
James A. Drash

Clerk, Civil Division

Date: July 16, 1999

Seal of the Court

APPENDIX N

NOVUS CREDIT SERVICES INC.
A Subsidiary of Morgan Stanley Dean Witter & Co.

Kevin B. Mason
Senior Legal Assistant

July 22, 1999

Richard A. Cole
14 Charles Street
Newburyport, MA 01950

In re: Cole, Steven P.

Dear Mr. Cole:

Enclosed are the documents provided at your request. Since Discover Financial Services, Inc., f/k/a NOVUS Services, Inc. is a subsidiary of NOVUS Credit Services, Inc., we are furnishing the information you requested.

Sincerely,
/s/ Kevin Mason/Srb
Kevin B. Mason

KBM/srb

Enclosure

2500 Lake Cook Road, Riverwoods, Illinois 60015
Tel[847]405-2885 Fax[847]405-3555

APPENDIX O

6011 0013 3151 6320 CARDMEMBER STATEMENT
12:42:08 07/21/99

COLE, STEVEN P CLOSING DATE: 12/06/94
VIEW DATE: 12 / 94

MERCHANDISE/RETAIL

11/01	FED. EXP. 02318346844 NEWBURYPORT MA	15.50
11/01	FED. EXP. 02266326602 NEWBURYPORT MA	15.50
11/03	SAMS CLUB 006337 SEABROOK NH	170.27
11/03	FED. EXP. 02318346461 NEWBURYPORT MA	15.50
11/03	FED. EXP. 02318346483 NEWBURYPORT MA	15.50
11/03	FED. EXP. 02318346726 NEWBURYPORT MA	15.50
11/14	FED. EXP. 02014929641 NEWBURYPORT MA	15.50
11/15	FED. EXP. 02318346446 NEWBURYPORT MA	15.50
11/15	FED. EXP. 02014929626 NEWBURYPORT MA	15.50
11/15	FED. EXP. 02014929663 NEWBURYPORT MA	15.50
11/15	FED. EXP. 03768410391 NEWBURYPORT MA	15.50
11/16	FED. EXP. 02318346450 NEWBURYPORT MA	15.50
11/16	FED. EXP. 03768410380 NEWBURYPORT MA	15.50
11/17	SAMS CLUB 006337 SEABROOK NH	110.65
11/19	FED. EXP. 03768410365 NEWBURYPORT MA	15.50
11/28	SAMS CLUB 006337 SEABROOK NH	124.39
11/28	SAMS CLUB 006337 SEABROOK NH	220.99
11/30	SAMS CLUB 006337 SEABROOK NH	88.47
12/02	SAMS CLUB 006337 SEABROOK NH	48.78

APPENDIX P

6011 0013 3151 6320 CARDMEMBER STATEMENT
12:42:18 07/21/99

COLE, STEVEN P CLOSING DATE: 02/06/95
VIEW DATE: 02 / 95

MERCHANDISE/RETAIL

01/05 FED. EXP. 037684103[illegible]3 NEWBURYPORT MA	15.50
01/11 FED. EXP. 03768410332 NEWBURYPORT MA	15.50
01/15 PETITE SOPH 2611 BURLINGTON MA	29.00
01/15 MARSHALLS 475 HAVERHILL MA	43.94
01/15 CHILDREN'S PALACE BURLINGTON MA	45.64
01/17 STEAMSHIP AUTHORITY WOODS HOLE MA	140.00
01/18 FED. EXP. 03768409013 NEWBURYPORT MA	15.50
01/18 FED. EXP. 03768409024 NEWBURYPORT MA	15.50
01/19 FED. EXP. 03768409046 NEWBURYPORT MA	15.50

APPENDIX Q

49 Pennsylvania Code § 16.96

Prescribing, administering and dispensing controlled sympathomimetic amines

(a) A medical doctor may not prescribe, administer or dispense, or cause the prescription, administration or dispensation of a controlled substance which is an amphetamine or other sympathomimetic amine, or a compound, derivative, congener of analog thereof, except as set forth in this section.

(b) A medical doctor may not prescribe, administer or dispense, or issue an order to administer or dispense, for weight reduction or control, a drug described in subsection (a) which is or includes a Schedule II controlled substance.

(c) A medical doctor may personally administer or dispense drugs described in subsection (a) for the following:

(1) The treatment of narcolepsy.

(2) The treatment of attention deficit disorder with hyperkinesis.

(3) The treatment of intractable seizure disorders.

(4) A study approved by the United States Food and Drug Administration under an approved Investigational New Drug Application.

(5) Inpatient use in a hospital.

(6) For the treatment of exogenous obesity, other than by use of a drug described in subsection (a) which is or includes a Schedule II controlled substance, in a regimen of weight reduction

based upon caloric restriction, if the following conditions are met:

(i) Before initiating the drug treatment, the medical doctor determines through review of the records or information concerning prior treatment which another treating doctor has provided to the medical doctor, that the patient has made a substantial good-faith effort to lose weight under a doctor-directed treatment program not utilizing drugs described in subsection (a), and that the treatment has not been effective. A determination made by a review of records or information provided by another doctor shall be documented in the patient's medical record.

(ii) Before initiating the drug treatment, the medical doctor obtains a thorough history, performs a thorough physical examination of the patient and rules out the existence of a recognized contraindication to the use of the drug. See § 16.92 (relating to prescribing, administering and dispensing controlled substances).

(7) To diagnose or treat a condition of a patient other than as provided for in this subsection, and other than for fatigue that is not a symptom of chronic illness or an effect of the treatment of a chronic illness, or for weight reduction or control.

(d) A medical doctor shall assign a different five-digit patient identification number to each patient to or for whom he prescribes, orders, administers or dispenses a controlled sympathomimetic amine. Once assigned, the number may not be changed. In a group practice, each medical doctor treating the patient with controlled sympathomimetic amine shall

use the same number. The medical doctor shall keep, as part of his medical records, a complete list, by patient identification number, of patients treated with a controlled sympathomimetic amine. For each identification number, the list shall include the patient's name, social security number and address.

(e) A medical doctor who prescribes, administers or dispenses, or causes the prescription, administration or dispensation of a drug described in subsection (a) shall file a quarterly report with the Board identifying, by the five-digit identification number assigned to the patient in compliance with subsection (d), each drug used, the quantity and dosage prescribed, administered or dispensed, the treatment or diagnostic purpose for which it was employed and the dates the drug was prescribed, administered or dispensed. Quarterly reports shall be filed by day 20 of the month following the quarter, that is, April 20, July 20, October 20, and January 20.

(f) The requirements of subsection (e) do not apply for a calendar quarter during which a medical doctor distributes or causes the distribution of less than 1,500 dosage units of controlled sympathomimetic amines. A medical doctor who files less than four quarterly reports in a calendar year will be required to file an annual report, due by January 20, which shall contain the same information required in the quarterly report. The first annual report shall be due January 20, 1989, and shall include the final quarter of 1987, as well as all quarters of 1998.

(g) This section will be deleted by January 17, 1992, by the Board, unless it is revised or reestablished by the Board within that 5-year period.

(h) This section is effective October 1, 1987.

APPENDIX R

28 Pa. Bull. 1316

PENNSYLVANIA BULLETIN

ISSUE: Volume 28, Number 11
ISSUE DATE: Saturday, March 14, 1998
SUBJECT: RULES AND REGULATIONS
AGENCY: STATE BOARD OF MEDICINE

28 Pa. Bull. 1316

PENNSYLVANIA CODE CITATION:
[49 PA. CODE CH. 16]

Title 48- PROFESSIONAL AND VOCATIONAL STANDARDS
STATE BOARD OF MEDICINE
Sympathomimetic amines

The State Board of Medicine (Board) amends § 16.96, as set forth in Annex A. The objective of this amendment is to effectuate the sunset provision at § 16.96.

Notice of proposed rulemaking has been omitted under section 204(3) of the act of July 31, 1968 (P.LO. 769, No. 240) (45 P.S. § 1204(3)) (CDL) because notice of proposed rulemaking is unnecessary.

This regulation sunsetted by its own terms on January 17, 1992. The Board has determined not to take any action to revise or reestablish the regulation.

Accordingly, in this amendment, the Board deletes § 16.96.

Compliance with Executive Order 1996-1

The Board reviewed this rulemaking and considered the purpose and likely impact upon the public and the regulated population under the directives of Executive Order

1996-1, Regulatory Review and Promulgation. The final omitted regulation addresses a compelling public interest as described in this Preamble and otherwise complies with Executive Order 1996-1.

Statutory Authority

This amendment is adopted under section 8 of the Medical Practice Act (63 P.S. § 422.8).

Fiscal Impact and Paperwork Requirements

This amendment will have no fiscal impact on the Commonwealth or its political subdivisions.

Regulatory Review

Under section 5.1(c) of the Regulatory Review Act (71 P.S. § 745.5.1(c)), a copy of the final-form regulation was submitted on January 14, 1998, to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the Senate Committee on Consumer Protection and Professional Licensure and the House Committee on Professional Licensure. In addition, at the same time, the final-form regulation was submitted to the Attorney General for review and comment under the Commonwealth Attorneys Act (71 P.S. §§ 732-101-732-506).

Under section 5(c) of the Regulatory Review Act, the regulation was deemed approved by the House and Senate Committees on February 3, 1998, and by the IRRC on February 13, 1998.

Additional information

Individuals who desire information are invited to submit inquiries to Cindy L. Warner, Board Administrator, State

Board of Medicine, Post Office Box 2649, Harrisburg, PA 17105-2649, (717)783-1400.

Findings:

The Board finds that:

(1) Public notice of intention to amend its regulations as adopted by this order under the procedures specified in sections 201 and 202 of the CDL (45 P.S. §§ 1201 and 1202) has been omitted under the authority contained in section 204(3) of the CDL because the Board has, for good cause, found that the procedures specified in sections 201 and 202 of the CDL are, in this circumstance, unnecessary because the provisions deleted are ineffective by the sunset provision in § 16.96(7)(g).

(2) The amendment of the regulations of the Board in the manner provided in this order is necessary and appropriate for the administration of its authorizing statute.

Order

The Board, acting under its authorizing statute, orders:

(a) The regulations of the Board, 49 Pa. Code Chapter 16, are amended by deleting § 16.96, to read as set forth in Annex A.

(b) The Chairperson of the Board shall submit this order and Annex A to the Office of the General Counsel and the Office of Attorney General for approval as to legality as required by law.

(c) The Chairperson of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) This order shall become effective immediately upon publication in the Pennsylvania Bulletin.

DANIEL B. KIMBALL, Jr., M.D.,

Chairperson

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 28 Pa.B. 1185 (February 28, 1998).)

Fiscal Note: 16A-496. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS

PART I. DEPARTMENT OF STATE

Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS

CHAPTER 16. STATE BOARD OF MEDICINE – GENERAL PROVISIONS

Subchapter F. MINIMUM STANDARDS OF PRACTICE

§ 16.96 (Reserved).

HISTORY Pa.B. Doc. No. 98-412. Filed for public inspection March 13, 1998.